

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA, for the use and )  
benefit of MMC CONTRACTORS NORTHEAST, )  
INC., )

Plaintiff, )

v. )

Case No.: 21-cv-902

ARCH INSURANCE COMPANY )

Serve: Superintendent of Financial Services )  
New York State Department of )  
Financial Services )  
Corporate Affairs Unit )  
One Commerce Plaza )  
20<sup>th</sup> Floor )  
Albany, New York 12257 )

**COMPLAINT**

and )

STRUCTSURE PROJECTS, INC., )

Serve: Northwest Registered Agent LLC )  
90 State Street, Suite 700 )  
Office 40 )  
Albany, New York 12207 )

Defendants. )

COMES NOW The United States of America for the use and benefit of MMC Contractors Northeast, Inc. (“MMC”), and for its Complaint against Arch Insurance Company (“Arch”) and Structsure Projects, Inc. (“Structsure”), states as follows:

**Allegations Applicable to All Counts**

1. MMC is a New Jersey corporation with its principal place of business located in Somerset, New Jersey.

2. Arch is an insurance company incorporated in the State of Missouri with its principal place of business located in Kansas City, Missouri.

3. Structsure Projects, Inc., formerly known as United Excel Corporation, is a Kansas corporation with its principal place of business located in Kansas City, Missouri.

4. This Court has subject matter jurisdiction over MMC's Miller Act claim pursuant to 28 U.S.C. § 1331 and § 1352 and supplemental jurisdiction over MMC's state law claim under 28 U.S.C. § 1367.

5. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) in that a substantial part of the events or omissions giving rise to MMC's claims occurred in the Southern District of New York, specifically in West Point, New York, and venue is proper under 40 U.S.C. § 3133(b)(3)(B) because the contract was to be performed in the Southern District of New York, specifically West Point, New York.

6. Upon information and belief, on or about September 9, 2014, the United States, through the Department of Army Corps of Engineers, Engineering District Little Rock, awarded a contract to Structsure (Contract No. W9127S-13-D-6002/TO 0003) (the "Contract") to perform renovations at the Keller Army Community Hospital in West Point, New York (the "Project").

7. Upon information and belief, the Contract required Structure to furnish all labor and materials to perform the work on the Project for a total price of \$39,466,177.00.

8. Pursuant to 40 U.S.C. §§ 3131 *et seq.* (the “Miller Act”), Structsure, as principal, and Arch, as surety, executed and provided Payment Bond No. SU1129538 (the “Bond”). A true and correct copy of the Bond is attached hereto as Exhibit 1 and is incorporated herein by reference.

9. Pursuant to the Bond, Structsure and Arch bound themselves to assure payment by Structsure of the claims of all persons having a direct relationship with Structure or a subcontractor to Structsure for furnishing labor, material or both in the prosecution of the work provided for in the Contract and any authorized modifications of the Contract.

10. On or about January 19, 2015, Structure executed a subcontract (“Subcontract”) with MMC dated September 9, 2014 whereby MMC agreed to furnish labor and materials to perform the mechanical and plumbing work on the Project and Structure agreed to pay MMC the sum of \$8,300,000.00 for said work, all as more fully defined in the Subcontract. A true and correct copy of the Subcontract is attached hereto as Exhibit 2 and is incorporated herein by reference.

11. During the course of the Project, Structure and MMC agreed to twenty-one change orders to the Subcontract which modified the scope of work to be performed by MMC and increased the price to be paid MMC for its work by \$1,395,562.00.

12. The agreed, adjusted Subcontract price was \$9,695,562.00.

13. Structsure made payments to MMC for MMC’s work on the Project totaling \$8,328,332.30.

14. The unpaid balance under the agreed, adjusted Subcontract is \$1,367,239.70.

15. MMC fully performed all terms and conditions of the Subcontract, as modified by the parties.

16. Pleading in the alternative, MMC substantially performed all terms and conditions of the Subcontract, as modified by the parties.

17. On or about December 23, 2020, MMC sent notice to Structsure and Arch of MMC's claim to payment for \$1,367,239.70 under the Subcontract. A true and correct copy of MMC's December 23, 2020 letter is attached hereto as Exhibit 3 and is incorporated herein by reference

18. In material breach of the Subcontract, Structure has failed and refused to pay MMC the unpaid balance of \$1,367,239.70 due under the Subcontract.

19. As a direct and proximate result of Structure's material breach of the Subcontract, MMC has suffered damages of \$1,367,239.70, plus interest.

20. Pursuant to Section 32.1 of the Subcontract, Kansas law applies to the Subcontract.

21. MMC is entitled to recover prejudgment interest on its damages at the rate of 10% per annum pursuant to K.S.A. 16-201.

22. Upon information and belief, Structsure has been paid in full for the work performed by MMC on the Project.

23. Pursuant to Section 25.6 of the Subcontract, MMC and Structure agreed to attempt to first resolve any disputes arising out of the Subcontract pursuant to mediation.

24. Pursuant to Section 25.7 of the Subcontract, in the event that mediation was not successful, MMC and Structure agreed to resolve any disputes arising out of the Subcontract pursuant to binding arbitration.

25. MMC has initiated mediation proceedings pursuant to the Subcontract but the mediation has not yet been conducted.

26. MMC and Structure have not yet commenced arbitration proceedings.

27. MMC is filing this action in advance of completion of mediation and arbitration with Structsure due to the one-year limitations period found at 40 U.S.C. § 3133(b)(4).

28. MMC itself performed labor on the Project under the Subcontract at least until February 4, 2020.

29. MMC had a direct subcontractor performing labor on the Project under the Subcontract until at least late March, 2020.

30. By the filing of this Complaint, MMC is not waiving its rights to mediate and, if necessary, arbitrate its disputes under the Subcontract.

**Count 1 – Miller Act Claim**

31. MMC restates, realleges and incorporates by reference all of the allegations contained in the Allegations Applicable to All Counts, all as if more fully set forth herein.

32. MMC furnished labor and materials for the Project as part of the work that Structsure agreed to perform under the Contract.

33. The labor and material furnished by MMC for the Project were furnished pursuant to the Subcontract.

34. More than ninety (90) days have passed since MMC last furnished labor or materials for the Project.

35. Less than one (1) year has elapsed since MMC last furnished labor or materials for the Project.

36. By reason of the foregoing, MMC Contractors Northeast, Inc. requests this Court to enter judgment in its favor and against Structsure Projects, Inc. and Arch Insurance Company,

jointly and severally, in the amount of \$1,367,239.70 (or such other amount determined to be due MMC Contractors Northeast, Inc. in any arbitration proceeding filed pursuant to the Subcontract), plus prejudgment interest thereon at the rate of 10% per annum from and after the date payment was due MMC, plus costs of Court, and for such other and further relief as the Court deems just and proper.

**Count 2 – Breach of Subcontract**

37. MMC restates, realleges and incorporates by reference all of the allegations contained in the Allegations Applicable to All Counts and the allegations contained in Count 1, all as if more fully set forth herein.

38. The Subcontract was a valid and enforceable contract between MMC and Structsure supported by sufficient consideration.

39. MMC fully performed all terms and conditions of the Subcontract, as modified by the parties.

40. Pleading in the alternative, MMC substantially performed all terms and conditions of the Subcontract, as modified by the parties.

41. In material breach of the Subcontract, Structure has failed and refused to pay MMC the unpaid balance of \$1,367,239.70 due under the Subcontract.

42. Structure's breach of the Subcontract has caused MMC damages.

43. By reason of the foregoing, MMC Contractors Northeast, Inc. requests this Court to enter judgment in its favor and against Structsure Projects, Inc. in the amount of \$1,367,239.70 (or such other amount determined to be due MMC Contractors Northeast, Inc. in any arbitration proceeding filed pursuant to the Subcontract), plus prejudgment interest thereon at the rate of 10%

per annum from and after the date payment was due MMC, plus costs of Court, and for such other and further relief as the Court deems just and proper.

**WHEREFORE**, Plaintiff MMC CONTRACTORS NORTHEAST, INC. demands judgment against the defendants as follows:

- A. damages in an amount not less than \$1,367,239.70;
- B. pre- and post-judgment interest on said sum at the rate of 10% per annum;
- C. the costs, disbursements, reasonable attorney's fees, and other costs of Court incurred in bringing this action; and
- D. such other and further relief as the Court deems just and proper.

Dated: Newburgh, New York  
February 2, 2021

Yours, etc.,

CATANIA, MAHON & RIDER, PLLC

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TO:

ARCH INSURANCE COMPANY  
Superintendent of Financial Services  
New York State Department of Financial Services  
Corporate Affairs Unit  
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20<sup>th</sup> Floor  
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